In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 480

CHARLES S. GEORGE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner was a civilian employee of the Department of the Army assigned to duty in Japan (Pet. App. 5a). On April 16, 1958, he received a reduction-in-force notice, advising him that he would be separated on May 14, 1958 (Pet. App. 5a-6a). Shortly thereafter he returned to the United States under orders, where he remained in a leave status until, in accordance with the reduction-in-force notice, he was dismissed (Pet. App. 6a).

Petitioner appealed to the Civil Service Commission, which, on November 10, 1959, ruled that the dismissal was procedurally invalid because petitioner

had not been given the full 30 days' advance notice of separation required by Section 14 of the Veterans Preference Act, 5 U.S.C. 863 (*ibid.*). The Commission directed that petitioner be reinstated as of the date following his dismissal (*ibid.*).

On December 3, 1959, petitioner was notified of his reinstatement and was subsequently given back pay for the entire period of his unlawful separation (*ibid.*). Also on December 3, the Army sent petitioner a second reduction-in-force notice, pursuant to which he was again separated on January 15, 1960 (Pet. App. 6a-7a). During the period between his reinstatement and the second separation, petitioner remained in the United States (Pet. App. 6a).

Despite the fact that the December 3 reduction-in-force notice advised petitioner of his right to appeal either under the Army grievance procedures or to the manager of the Civil Service Commission Branch Office in Honolulu "any time * * * up to but not later than ten (10) calendar days after the effective date of the action" (Pet. App. 8a), petitioner did not do so. It was not until April 29, 1960—more than three months after his separation—that petitioner sent a letter to the Commission, addressed to the Chairman of the Board of Appeals and Review rather than to the Honolulu Branch Office Manager, alleging that the separation was invalid (Pet. App. 10a).[1]

[1] The only action taken by petitioner within the prescribed appeal period was to request certain documents from the Civilian Personnel Director. These documents were sent to him on March 4, 1960, almost two months before petitioner attempted to appeal to the Civil Service Commission (Pet. App. 9a-10a).

The Civil Service Commission rejected the appeal on the ground that it was untimely (Pet. App. 15a-16a), and petitioner thereupon instituted this suit in the Court of Claims. In that court, petitioner asserted that his second separation was invalid because the Army had not physically restored him to his former position in Japan when the Civil Service Commission determined that the first dismissal was procedurally defective.

Adopting the findings and recommendations of the trial commissioner, the Court of Claims dismissed the action (Pet. App. 1a). In his opinion, the commissioner noted that the suit "could appropriately be dismissed" because of petitioner's failure to pursue timely his administrative remedy (Pet. App. 3a). Choosing, however, not "to base the disposition of the case solely upon this ground" (*ibid.*), the commissioner went on to determine that, even assuming the Army had been under a legal obligation to return petitioner to Japan and to reassign him to his former duties there, the failure to do so had not prejudiced petitioner (Pet. App. 4a-5a).

2. The decision below is clearly correct and presents no question of general importance requiring review by this Court.

a. In view of petitioner's undisputed failure to prosecute a timely administrative appeal, there was no occasion for the court even to entertain his attack upon his second separation. The time limitation on appeals from notices of reduction-in-force is provided in the Commission's regulations, which are not challenged by petitioner. 5 C.F.R. (1960 Pocket Supp.)

20.9(a). That limitation was expressly called to petitioner's attention in the reduction-in-force notice (Pet. App. 8a). Petitioner, a lawyer, does not contend that he did not understand the advice contained in the notice respecting his right of appeal. Nor, as the Civil Service Commission pointed out in rejecting his untimely appeal (Pet. App. 14a, 15a), did petitioner establish circumstances beyond his control which precluded him from observing the 10-day time limit.[2]

b. In any event, there is no merit to petitioner's insistence that his second separation was invalid because he was not returned to Japan.

As the Army explained to petitioner, he was not returned to Japan because his position had been abolished; *i.e.*, there was no existing position in that country to which he could be restored (Pet. App. 9a). Petitioner points to no statute or regulation which requires an agency to restore the employee physically to a position which no longer exists. Plainly, the Army fulfilled its obligation to petitioner when it restored him to the rolls, paid him the full amount to which he was entitled for the period of his unlawful separation, and then gave him the thirty

[2] Petitioner asserts (Pet. p. 6) that a timely appeal was precluded by the refusal of the Army to permit him access to "records and information" which he needed to perfect his appeal. This claim is baseless. Apart from the fact that he was not refused access to any documents he had requested, there was nothing to prevent him from filing his appeal within the time limit and then taking steps to obtain those records and other information, if any, which he may have deemed relevant to the propriety of his reduction-in-force.

days' notice of reduction-in-force which the Veterans Preference Act requires.

Nor was petitioner prejudiced by the failure to return him to Japan. While petitioner claims (Pet. pp. 4, 6) that he was thereby denied access to records essential to the prosecution of his appeal, he has never indicated what those records are or what bearing they might have on his reduction-in-force. In this connection, it is to be noted that petitioner took advantage of his right, referred to in the second reduction-in-force notice (Pet. App. 8a), to inspect "the retention registers and records affecting [his] case." Upon his request, the Civilian Personnel Director sent petitioner a copy of the retention register (Pet. App. 9a). Thereafter, petitioner acknowledged that the register was the "essential" document "pertaining to the case" (Pet. App. 13a).

For these reasons, we respectfully submit that the petition should be denied.

ARCHIBALD COX,
Solicitor General.

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